

JUN 11 1969

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES G. RUSSELL,
Appellant,

v.

PAUL H. NITZE, Secretary of the Navy,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF IDAHO

SUPPLEMENTARY MEMORANDUM

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FILED

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WM. B. LUCK, CLERK

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No. 22528

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SUPPLEMENTARY MEMORANDUM

This supplementary memorandum is submitted pursuant to the Court's request, made during oral argument on May 16, 1969. On pages 2 to 8 we have set forth the Navy Regulations in force in 1963, the time of the events in question.

In connection with the Secretary's contention that Russell has not exhausted his administrative remedies^{1/} the Court inquired whether Mr. Russell, at this late date, still may have review before the Board for the Correction of Naval Records. At page 9 of this memorandum we set out the full text of a letter from the Department of the Navy dated May 21, 1969, and stating that "Mr. Russell is now privileged to

1/ See Craycroft v. Ferrall, C. A. 9, Dkt. No. 22,582, decided March 5, 1969.

petition the Board for Correction of Naval Records to review his case."

REGULATIONS INVOLVED

Navy Regulations, amended as of January 23, 1963, and in effect upon the dates in question, provide in relevant part:

32 C.F.R. 730.12 Discharge of enlisted personnel by reason of unfitness.

(a) Enlisted personnel may be separated by reason of unfitness with an undesirable discharge or with a higher type discharge when it is warranted by the particular circumstances in a given case. A discharge by reason of unfitness, regardless of the attendant circumstances, will be effected only when directed by or authorized by the Chief of Naval Personnel. The provisions of this section are not to be used as a substitute for action under the Uniform Code of Military Justice (10 U.S.C. 801-940). Therefore, discharge by reason of unfitness will not be issued in lieu of disciplinary action except upon the determination by the Chief of Naval Personnel that the interests of the service as well as the individual will best be served by administrative discharge. Accordingly, discharge by reason of unfitness normally will not be recommended in lieu of disciplinary action.

(b) An enlisted person may be recommended for discharge by reason of unfitness to free the service of persons whose military record is characterized by one or more of the following:

(1) Frequent involvement of a discreditable nature with civil or military authorities.

(2) Sexual perversion including but not limited to (i) lewd and lascivious acts, (ii) homosexual acts, (iii) sodomy, (iv) indecent exposure, (v) indecent acts with or assault upon a child under age 16, or (vi) other indecent acts or offenses.

(3) Drug addiction or the unauthorized use or possession of habit-forming narcotic drugs or marijuana.

(4) An established pattern for shirking.

(5) An established pattern showing dishonorable failure to pay just debts.

(6) Other good and sufficient reasons, as determined by the Chief of Naval Personnel.

(c) In each case processed in accordance with this section, the individual is subject to an undesirable discharge and therefore the following is required:

(1) The individual must be informed in writing of the reason(s) for which he is being considered for discharge.

(2) The individual must be afforded an opportunity to submit in writing a request for or a waiver of the privileges set forth in § 730.14(c).

(d) Attention is directed to § 730.14 which prescribes the detailed procedure for submission of reports and recommendations for discharge by reason of unfitness.

(e) Enlisted personnel, except those processed under paragraph (b)(2) of this section, shall be retained on board pending receipt of instructions from the Chief of Naval Personnel.

(f) Enlisted personnel serving on board ships, overseas stations, and continental U.S. activities lacking separation facilities who are recommended for discharge in accordance with paragraph (b)(2) of this section may be transferred to the nearest continental U.S. separation activity to await instructions from the Chief of Naval Personnel. The transfer orders and records must accurately reflect the person's status and reason for transfer in order to ensure that the individual is held pending receipt of the instructions from the Chief of Naval Personnel. In this connection, a complete copy of the papers forwarded to the Chief of Naval Personnel shall be filed in the individual's service record.

32 C.F.R. 730.14 Preparation of brief form and other documents required under §§ 730.10, 730.12, and 730.13.

(a) The cases of enlisted personnel under consideration for discharge by reason of unsuitability, unfitness, or misconduct under §§ 730.10, 730.12, or 730.13 respectively shall be prepared as set forth herein. Commanding officers shall ensure that complete and carefully prepared briefs are submitted and that the instructions in this section are scrupulously adhered to.

(b) An enlisted person being considered for a discharge by reason of unsuitability shall be informed as to the circumstances which are the basis for the contemplated action and shall be afforded an opportunity to make a statement in his own behalf.

(c) An enlisted person who is subject to undesirable discharge by reason of unfitness under § 730.12 or by reason of misconduct under § 730.13 shall, if his whereabouts is known, be informed as to the circumstances which are the basis for the contemplated action and afforded an opportunity to request or waive, in writing, any or all of the following privileges:

(1) To have his case heard by a board of not less than three officers.

(2) To appear in person before such board (unless in civil confinement or otherwise unavailable).

(3) To be represented by counsel who, if reasonably available, should be a lawyer.

(4) To submit statements in his own behalf.

If the individual submits a written request to have his case heard by a field board of officers, the commanding officer shall convene an administrative board in accordance with § 730.15. The recorder for the field board shall be furnished with the completed brief of the case (paragraph (g) or (h) of this section), as appropriate, and the service record of the individual concerned.

(d) Those cases processed under § 730.12 or § 730.13 wherein the individual waives or does not request field board action and those cases wherein the individual is processed under § 730.10 shall be forwarded, together with all pertinent papers, direct to the Chief of Naval Personnel to final action.

(e) When discharge under § 730.10 or § 730.12 is contemplated, a brief shall be prepared in the format of Exhibit 1 (see paragraph (g) of this section) in accordance with the following instructions:

(1) Summary of military offenses.
List in chronological order all disciplinary action during current enlistment. Include service record entry page numbers, date of non-judicial punishment or court-martial by type, description of offense(s), non-judicial punishment or sentence as approved and approval data, and all violations of brig or retraining command regulations during current confinement with action taken thereon.

(2) Unclean habits, if any. Substantiate all unclean habits including the occurrence of repeated venereal disease infections during the current enlistment. When reporting venereal diseases, indicate the date of each admission and nature of the infection.

(3) Civil conviction, if any, on the basis of information contained in the service record or otherwise readily available.
List date and court in which convicted, offense, and sentence awarded.

(4) Enclosures. (i) Individual's signed statement in own behalf. If an undesirable discharge is being considered, statement should include, "I have been advised that I may be discharged under other than honorable conditions and the basis therefor. I understand such discharge may deprive me of virtually all veterans' benefits based upon my current period of active service, and that I may expect to encounter substantial prejudice in civilian life in situations wherein the type of service rendered in any branch of the Armed Forces or the character of the discharge received

therefrom may have a bearing. In regard thereto, I desire to make the following statement . . . " If the individual refuses to make or sign a statement, a page 13 service record entry to that effect should be enclosed.

(ii) Copy of page 9 of the service record.

(iii) Individual's signed request for or waiver of privileges outlined in paragraph (c) of this section. (Note that this requirement does not apply to cases processed under § 730.10.)

(iv) Other pertinent documents such as psychiatric or medical evaluation (especially in aberrant sexual behavior cases), police report, etc.

(v) Comment and recommendation of commanding officer and/or his concurrence or nonconcurrence if case is heard by a field board. If the commanding officer contemplates recommending a less favorable disposition than that proposed by the field board or if the pertinent section (§ 730.12 or § 730.13) permits a less favorable disposition than that proposed by the field board, the commanding officer shall inform the individual accordingly and afford him an opportunity to submit such additional statement as he desires in an effort to show cause why a less favorable action should not be finally taken.

(f) When a case is processed under § 730.13, a brief shall be prepared in the format of Exhibit 2 (see paragraph (h) of this section), in accordance with the following instructions:

(1) Circumstances of offense(s) in detail. Include a brief resume of the circumstances surrounding the offense and the pertinent dates.

(2) Action of civil authorities. Include citation of any civil statute(s) violated, charge on which tried and convicted, court in which convicted, and maximum punishment which could have been imposed for such a conviction under the UCMJ (Uniform Code of Military Justice), D.C. Code, or Title 18, U.S. Code as applicable (see § 730.13).

(3) Previous civil convictions, if any, on the basis of information contained in the service record or otherwise readily available. List date and court in which convicted, offense, and sentence awarded.

(4) Summary of military offenses, if any. List in chronological order all disciplinary action during current enlistment. Include service record entry page numbers, date of non-judicial punishment or court-martial by type, description of offense(s), non-judicial punishment or sentence as approved and date of approval, and all violations of brig or retraining command regulations during current confinement with action taken thereon.

(5) Remarks. Include location of individual's records, any unauthorized absence involved, and disciplinary action taken or pending, identification of any other military personnel involved in the case, etc.

(6) Enclosures. (i) Individual's signed statement in own behalf. All such statements should include, "I have been advised that I may be discharged under other than honorable conditions and the basis therefor. I understand such discharge may deprive me of virtually all veterans' benefits based upon my current period of active service, and that I may expect to encounter substantial prejudice in civilian life in situations wherein the type of service rendered in any branch of the Armed Forces or the character of discharge received therefrom may have a bearing. In regard thereto, I desire to make the following statement * * *". If statement cannot be obtained, or if the individual refuses to make or sign a statement, a page 13 service record entry to that effect should be enclosed.

(ii) Statement of witnesses, arrest reports, copies of court records, probation orders, or any other pertinent documents.

(iii) Copy of page 9 of the service record.

(iv) Individual's signed request for or waiver of privileges outlined in paragraph (c) of this section. If such request cannot be obtained, include information relative to the attempt made to get the request.

(v) Comment and recommendation of commanding officer and/or concurrence or non-concurrence if case is heard by a field board. If the commanding officer contemplates recommending a less favorable disposition than that proposed by the field board or if the pertinent section (§ 730.12 or § 730.13) permits a less favorable disposition than that proposed by the field board, the commanding officer shall inform the individual accordingly and afford him an opportunity to submit such additional statement as he desires in an effort to show cause why a less favorable action should not be finally taken.

(g) Exhibit 1: Brief concerning individuals processed under (check one).

LETTER FROM THE DEPARTMENT OF THE NAVY



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
WASHINGTON, D. C. 20370

CEC:mas
21 May 1969

Honorable William D. Ruckelshaus
Assistant Attorney General
Civil Division
Department of Justice
Washington, D. C. 20530

Attention: Mr. Morton Hollander
Chief, Appellate Section

Re: James G. Russell v. Nitze

Dear Sir:

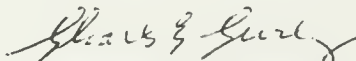
This is in response to your telephonic inquiry requesting information as to the jurisdiction of the Board for Correction of Naval Records to review the case of Mr. James G. Russell, a former member of the naval service.

Department of the Navy records show that Mr. Russell was discharged on 29 July 1963 with an undesirable discharge. Thereafter, pursuant to the provisions of 10 USC 1553, he petitioned the Navy Discharge Review Board to review his case with the view to changing the undesirable discharge, and on 19 September 1966 the Secretary of the Navy approved that Board's decision that the undesirable discharge not be changed.

Mr. Russell is now privileged to petition the Board for Correction of Naval Records to review his case. The law under which the Board operates, 10 USC 1552, and its implementing regulations, provide that the application, DD Form 149, should be filed within three years after discovery of the alleged error or injustice, but a failure to so file may be excused by the Board if it finds it would be in the interest of justice to do so. Mr. Russell may file within three years of the Navy Discharge Review Board's denial, 18 September 1969. In the event he files after that date, he should submit such reasons as he may have for not filing sooner in order that such reasons may be considered by the Board in determining whether or not it should excuse the failure to file within three years.

I am enclosing a copy of the standard form application, DD 149, and a copy of the Board's regulations.

Sincerely yours,


CHARLES E. CURLEY
Executive Secretary

Encls

Respectfully submitted,

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General,

J. F. BATES,
United States Attorney,

CARL EARDLEY,
Deputy Assistant Attorney General,

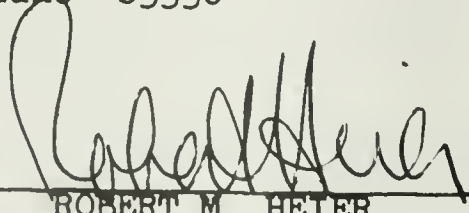
MORTON HOLLANDER,
ROBERT M. HEIER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

JUNE 1969.

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 1969, I served the foregoing Supplementary Memorandum of the appellee Paul H. Nitze, Secretary of the Navy, by mailing three copies, postage prepaid, air mail, to counsel for appellant:

Cecil D. Hobdey, Esquire
James, Hobdey & Shaw
Box 176
Gooding, Idaho 83330



ROBERT M. HEIER
Attorney for Appellee.